

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 13, 2016

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2015AP2608-CR

Cir. Ct. No. 2013CT932

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LORY F. KERK,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Outagamie County: NANCY J. KRUEGER, Judge. *Affirmed.*

¶1 SEIDL, J.¹ Lory Kerk appeals a judgment of conviction for operating a motor vehicle while intoxicated (OWI), third-offense. Kerk argues that the circuit court erroneously exercised its discretion when it admitted the

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

testimony of the State's expert toxicology witness under WIS. STAT. § 907.02. We disagree and therefore affirm the judgment of conviction.

BACKGROUND

¶2 At a jury trial, Fox Valley Metro Police Department officer Michael Grumann testified that on August 2, 2012, around 9:00 p.m., he stopped a vehicle he observed speeding. Upon being stopped, the driver, later identified as Kerk, stepped out of her vehicle. Kerk told Grumann she had dogs in her vehicle and asked him “what she should do.” Grumann told her to stand by her vehicle.

¶3 After explaining to Kerk why he stopped her vehicle, Grumann detected a moderate odor of alcohol and observed that she had watery eyes. When Grumann asked Kerk if she had been drinking that day, she told him she had one drink at 3:00 p.m. Grumann then asked Kerk whether she had taken any prescription medications that day, and she told him that “she took a Vicodin and a Prozac” earlier in the day, taking the Vicodin at 3:30 p.m. Kerk told Grumann she was taking the medications in accordance with her prescription.

¶4 After Kerk failed field sobriety tests, she was placed under arrest for OWI, and transported to a local hospital for a blood draw. An analysis of Kerk's blood showed a blood alcohol concentration (BAC) of .063%. The analysis also showed that Kerk's blood contained fluoxetine² and hydrocodone.

¶5 Prior to trial, Kerk filed a motion under WIS. STAT. § 907.02 to exclude any expert testimony from Amy Miles, director of the state laboratory of

² Fluoxetine is the generic name for Prozac. *Pirelli Armstrong Tire Corp. Retiree Med. Benefits Trust v. Walgreen Co.*, 631 F.3d 436, 438 (7th Cir. 2011).

hygiene’s forensic toxicology unit, regarding whether: (1) Kerk was impaired by the amount of alcohol and prescription drugs found in her blood; and (2) a hypothetical person would be impaired by the amount of alcohol and prescription drugs found in Kerk’s blood.

¶6 After briefing and argument, the circuit court denied Kerk’s motion in limine and the matter proceeded to trial. Miles testified at trial, and the following exchange between the prosecutor and Miles took place during her testimony:

Q Back to the question. If someone displays all six clues of the HGN, meaning, the lack of smooth pursuit [sic], maximum deviation, and the onset of nystagmus prior to 45 degrees in both eyes, demonstrates an inability to walk a straight line heel to toe as instructed, difficulty maintaining balance, leg and eyelid tremors, would those be—would those factors be consistent or inconsistent with a person who’s under the influence of alcohol and hydrocodone?

A Consistent.

Q And using those same hypothetical factors, and based on your training and education and experience, would those factors be consistent or inconsistent with an individual who is less able to exercise the clear judgment and steady hand needed to safely operate a motor vehicle?

A It would be consistent.

Kerk was ultimately convicted of third-offense OWI. She appeals.

DISCUSSION

¶7 “The admissibility of expert testimony is governed by WIS. STAT. § 907.02.” *State v. Giese*, 2014 WI App 92, ¶17, 356 Wis. 2d 796, 854 N.W.2d 687. This statute was amended in 2011 to adopt the *Daubert* standard. See *State v. Kandutsch*, 2011 WI 78, ¶26 n.7, 336 Wis. 2d 478, 799 N.W.2d 865. Under

Daubert, a circuit court is to perform a “gate-keeper” role “to ensure that the expert’s opinion is based on a reliable foundation and is relevant to the material issues.” *Giese*, 356 Wis. 2d 796, ¶18 (citing *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589 n.7 (1993)). “The court is to focus on the principles and methodology the expert relies upon, not on the conclusion generated.” *Id.*

¶8 We review the “circuit court’s decision to admit or exclude expert testimony under an erroneous exercise of discretion standard.” *Giese*, 356 Wis. 2d 796, ¶16. “A circuit court’s discretionary decision will not be reversed if it has a rational basis and was made in accordance with accepted legal standards in view of the facts in the record.” *Id.*

¶9 Kerk argues: (1) Miles was not qualified to testify regarding impairment in a person caused by alcohol and prescription drugs; (2) Miles’s impairment testimony was not based on reliable principles and methods—because she was not qualified to testify regarding impairment in a person caused by alcohol and prescription drugs; and (3) Miles’s impairment testimony was not based on sufficient facts and data. Because Kerk’s first two arguments rely on the same premise—that Miles was not qualified to testify regarding impairment caused by alcohol and prescription drugs—we will address the arguments together.

¶10 We conclude that the circuit court properly exercised its discretion when it determined that Miles was qualified to testify regarding impairment caused by alcohol and prescription drugs. The circuit court found that Miles: (1) authored published articles relating to driving and prescription drugs; (2) participated in publications relating to alcohol, prescription drugs, and impairment; and (3) participated in training sessions and conferences regarding

impaired drivers. These findings are not clearly erroneous, and we are therefore bound by them. *See* WIS. STAT. § 805.17(2). Based on these factual findings, Miles was qualified to testify regarding impairment in a person caused by alcohol and prescription drugs.

¶11 Nonetheless, Kerk relies upon *State v. Bailey*, 54 Wis. 2d 679, 196 N.W.2d 664 (1972), to argue the circuit court erroneously exercised its discretion here when it found that Miles was qualified to testify regarding impairment caused by alcohol and prescription drugs. Kerk’s reliance on *Bailey* is misplaced. In *Bailey*, our supreme court held that, under the pre-*Daubert* version of WIS. STAT. § 907.02, a chemist was not qualified to testify regarding how alcohol—or a certain amount of alcohol—would impair a person because the chemist only had qualifications related to chemistry. *See Bailey*, 54 Wis. 2d at 684-85. Here, the court properly noted Miles’s training and experience, which qualified her to testify regarding the impairment caused by alcohol and prescription drugs.

¶12 Kerk also argues that under *State v. Donner*, 192 Wis. 2d 305, 531 N.W.2d 369 (Ct. App. 1995), Miles’s experience in “dosing” scenarios—where she observed both people’s consumption of alcohol and the resulting effects it had on them—was insufficient to qualify her as an expert to testify regarding impairment caused by alcohol and prescription drugs. However, *Donner* is inapposite. In *Donner*, we simply held that, under the pre-2011 version of WIS. STAT. § 907.02, a chemist was qualified to testify—largely based on her experience in “dosing” scenarios regarding alcohol—“that all persons are physically impaired to some extent at a BAC level of .09%.” *Donner*, 192 Wis. 2d at 315. *Donner* does not suggest that participation in “dosing” scenarios is determinative of whether a person is qualified to testify regarding impairment in a person caused by alcohol and prescription drugs.

¶13 Finally, Kerk's argument that Miles's impairment testimony was not based on sufficient facts and data is neither supported by citation to legal authority, nor adequately developed. Therefore, we decline to address it. *See M.C.I., Inc. v. Elbin*, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988).

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

